IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 320 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

CHHAGANBHAI KANJIBHAI JETHVA

Versus

THE STATE OF GUJARAT

Appearance:

Shri Y.S. Lakhani, Advocate, for the Appellant-accused

Shri M.A. Bukhari, Addl. Public Prosecutor, for the Respondent-State

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 06/11/96

ORAL JUDGEMENT

The original accused has invoked the appellate jurisdiction of this Court by means of this appeal under sec. 374 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief) for questioning the correctness of the judgment and order of conviction and sentence passed

by the learned Additional Sessions Judge at Rajkot on 23rd March 1994 in Sessions Case No. 2 of 1992. Thereby the learned trial Judge convicted the appellant-accused of the offences punishable under sections 376 and 506(2) of the Indian Penal Code, 1860 (the IPC for brief) and sentenced him to rigorous imprisonment for 7 years and fine of Rs. 2000 in default rigorous imprisonment for 6 months for the offence punishable under sec. 376 thereof and rigorous imprisonment for 3 months for the offence punishable under sec. 506(2) thereof. The substantive sentences have been ordered to run concurrently.

2. The facts giving rise to this appeal move in a narrow compass. The appellant-accused was a building contractor by profession at the relevant time in Rajkot. The complainant is one Hansaben alias Hemiben (Hemlata) wife of Bhagwanjibhai Bachaniya and daughter of Karsanbhai Kadia. Her husband was a mason. He was working for the appellant-accused at the relevant time. It appears that the complainant's husband was allotted one room in a house belonging to the appellant-accused free of rent. It was situated in the Gandhigram society. It appears that the complainant's husband occupied the said premises presumably as a service tenant. It appears that the complainant's husband would leave for his work at about 8.30 in the morning and would come back from his work in the evening at about 6.30 or 7 p.m. He would not ordinarily go back to his house for taking lunch if his place of work was somewhat away therefrom. The incident giving rise to this proceeding is stated to have occurred on 12th November 1990 at about 3 p.m. The complainant and her two small children were alone in the house. It may be mentioned that the couple had two children, one daughter and one son. The daughter was aged about 4 years at the relevant time and the son was about 2 1/2 months old. It is the case of the prosecution that on that day at about 3 p.m. the appellant-accused visited her house and taking advantage of her loneliness for all practical purposes committed rape on her under the threat of life of her husband in the case of her not surrendering to his carnal desire. It appears that she did not report the incident to her husband for a couple of days. It appears that the daughter informed her father in the evening of 14th November 1990 about the occurrence of the incident in question. At that stage, the complainant appears to have informed her husband of the incident in question with necessary details. She is thereafter stated to have attempted to commit suicide by sprinkling kerosene on her body. Her attempt was however foiled by her daughter and her husband and other neighbours gathered together there. At that stage, her

husband gave information to the Police Control about his wife's attempt to commit suicide and sought the police help. It appears that the Police Control passed on that information to the Taluka Police Station at Rajkot. That information was received by the Police Inspector in charge of that police station. His name was Jayantibhai Becharbhai Vasava. He has been examined as Prosecution Witness No. 11 at Ex. 33 on the record of the trial court. He appears to have gone to the complainant's house. On inquiry he appears to have found commission of the offence by the appellant-accused. He thereupon recorded the complaint of the complainant. It is at Ex. 19 on the record of the trial Court. It was sent to the Taluka Police Station at Rajkot for registration. It was registered in the station diary thereat. The entry in that regard is at Ex. 30 on the record of the trial court. The investigation was entrusted to the Police Sub-Inspector, named, N.D. Parmar. He has been examined as prosecution witness No. 13 at Ex. 36 on the record of the trial court. On completion of investigation, the necessary charge-sheet was submitted in the Court of the Chief Judicial Magistrate at Rajkot on 8th January 1991 charging the appellant-accused with the offences punishable under sec. 376 and 506(2) of the IPC. It came to be registered as Criminal Case No. 134 of 1991. Since the offence under sec. 376 of the IPC was triable by the Court of Sessions, the learned trial Magistrate committed the case to the Sessions Court at Rajkot by his order passed on 2nd January 1992. It came to be registered as Sessions Case No. 2 of 1992. It appears that the learned Sessions Judge at Rajkot framed the charge against the accused on 15th April 1993 at Ex. 2 on the record of the trial court. The appellant-accused did not plead guilty to the charge. He was thereupon tried. It appears that the case was thereafter assigned to the learned Additional Sessions Judge at Rajkot for trial and disposal. After recording the prosecution evidence and after recording the further statement of the appellant-accused under sec. 313 of the Cr.P.C. and after hearing arguments, by his judgment and order passed on 23rd March 1994 in Sessions Case No. 2 of 1992, the learned Additional Sessions Judge at Rajkot convicted and sentenced the appellant-accused as aforesaid. The aggrieved accused has thereupon invoked the appellate jurisdiction of this Court by means of this appeal under sec. 374 of the Cr.P.C. for questioning the correctness of the aforesaid judgment and order of conviction and sentence passed by the learned trial Judge.

3. Learned Advocate Shri Lakhani for the appellant-accused has taken me through the entire

evidence on record in support of his submission that the learned trial Judge was in error in coming to the conclusion that the case against the appellant-accused was proved by the prosecution at trial beyond any reasonable doubt. It has been urged by learned Advocate Shri Lakhani for the appellant-accused that the learned trial Judge ought to have appreciated that a false case was filed against the appellant-accused on account of dispute regarding the rented premises. It has also been urged by learned Advocate Shri Lakhani for the appellant-accused that in any case, in view of material contradictions and discrepancies on record, the learned trial Judge ought to have come to the conclusion that the prosecution could not bring the guilt home to the accused beyond any reasonable doubt and the benefit of doubt would operate in favour of the appellant-accused. As against this, learned Additional Public Prosecutor Shri Bukhari for the respondent-State has urged that the learned trial Judge has carefully scanned and scrutinized the evidence on record and has come to the conclusion that the appellant-accused was found guilty of the charge levelled against him beyond any reasonable doubt. Learned Additional Public Prosecutor Shri Bukhari has further urged that the learned trial Judge has taken into consideration contradictions and discrepancies appearing on the record and he has rightly not doubted the prosecution case on finding them to be minor in nature. It has been urged by learned Additional Public Prosecutor Shri Bukhari for the respondent-State that the impugned judgment and order of conviction and sentence passed by the learned trial Judge is a very well considered judgment and calls for no interference by this Court in this appeal at the instance of the appellant-accused.

4. It may be mentioned at this stage that the medical evidence neither supports the prosecution nor the defence. The reason therefor is quite imple. The incident in question is stated to have occurred at about 3 p.m. on 12th November 1990. The complainant was sent for medical examination in that regard on 15th November 1990, more than 55 hours after the occurrence of the incident. Besides, as transpiring from her oral testimony at Ex. 18 on the record of the trial court, the complainant had sexual intercourse with her husband during the intervening period. In that view of the matter, the report of her medical examination with respect to the incident in question would pale into insignificance.

5. Even at the cost of repetition, it may be reiterated that the incident in question is stated to

have occurred on 12th November 1990 at about 3 p.m. It is the case of the prosecution that the complainant was practically alone in the house. Her two children were stated to be too small to understand the implications of the incident in question. In their presence the offence is stated to have been committed by the appellant-accused. Her husband has been examined as prosecution witness No. 8 at Ex. 27 on the record of the case. He has unequivocally stated in his evidence that the behaviour of his wife on the date of the incident and on the next day was quite normal. That by itself would cast some shadow of doubt on the occurrence of the incident in question. A woman who has lost her chastity against her will or wish would not remain normal qua her routine behavioural pattern. In fact, in her oral testimony at Ex. 18 on the record of the trial Court, the complainant has unequivocally stated that after the occurrence of the incident she kept on crying for two continuous days. According to her, he tried to ascertain from her the cause of her crying and weeping but she would not say anything to him about the incident as she was threatened with the life of her husband by the appellant-accused if the incident was disclosed to anyone. This version appearing in her oral testimony at Ex. 18 on the record of the trial court would lend support to my conclusion that a woman losing her chastity against her will or wish would not remain normal in her routine behavioural pattern. She would be found in a disturbed state of mind. As transpiring from her husband's oral testimony at Ex. 27 on the record of the trial court, her behavioural pattern on the day of the incident and on the next day was quite normal. With respect, this material discrepancy on record appears to have been lost sight of by the learned trial Judge.

6. It transpires from the oral testimony of the complainant's husband at Ex. 27 on the record of the case that he found her to be somewhat disturbed on 14th November 1990, If that be so, some incident could have occurred on that day and not two days ago on 12th November 1990. That apart, as transpiring from the oral testimony of the witness at Ex. 27 on the record of the case, on finding her in a disturbed state on 14th November 1990, he enquired of her as to the cause of or the reason for her such disturbed state of mind. It is the prosecution case that at that stage the daughter of theirs by the name of Prashna informed her father of the incident. It transpires from the version given by the child to her father as stated by him in his evidence that the incident occurred on that day on 14th November 1990 and not two days before as is the prosecution case. This

factual position would also create some doubt about the exact date of occurrence of the incident in question.

7. At this stage it would be worthwhile referring to several contradictions found in the oral testimony of the complainant at Ex. 18 on the record of the case qua her complaint at Ex. 19 thereon. Her case was that the appellant-accused entered the house and shut the door soon thereafter within two minutes. She tried to raise shouts for help. So did her daughter. She is stated to have shouted for help for 15 minutes and her daughter for three minutes. Her daughter was silenced by the appellant-accused. All these details do not figure in her police complaint. In her oral testimony she has stated that she resisted the loss of honour at the instance of the appellant-accused. This part of her story does not figure in her police complaint. Even the medical evidence does not support her case of her attempt to resist the loss of her honour at the relevant time. She has stated in her oral testimony that, after the incident when her husband returned home in the evening, she was found weeping but she could not explain to him the reason therefor for two days and their daughter informed him of the incident two days later. At that stage she informed him of the incident in detail and she indicated to him that she would commit suicide on that account. All these details again do not figure in her police statement recorded as her complaint. She has further stated in her oral testimony that she wanted to commit suicide on account of the loss of her honour and she sprinkled kerosene on her body in the evening of 14th November 1990 and she was about to set herself to fire when her daughter aged 4 years took away the match box from her. This statement of hers in her oral testimony would go to show that the female child of tender years was quite sensible. The complaint is silent about her sensibility qua raising of shouts. What the complainant has stated in her oral testimony in that regard does not figure in her complaint at Ex. 19 on the record of the case. She does not appear to have raised shouts at the relevant time or had resisted the rape on her mother. This assumes importance in view of the oral testimony of the complainant to the effect that one Bhartiben was her opposite door neighbour. Any sensible child could have shouted for help from the opposite door neighbour at that time.

8. That brings me to contradictions found between the oral testimony of her husband at Ex. 27 on the record of the case and his police statement. According to him, on 14th November 1990 he found his wife not to be

in a proper frame of mind. This factual position does not figure in his police statement. According to him, at that time he was informed by his daughter about the incident. That part of his oral evidence does not figure in his police statement. These are all admittedly very relevant facts. It is not the case of the prsecution that his police statement came to be recorded after a long lapse of time and he would have missed to mention the aforesaid facts in his police statement. His police statement was recorded on 15th November 1990 and he could not have missed to state those relevant facts. In fact, even if his police statement was recorded after a couple of months, he would not have missed to state therein the aforesaid relevant facts because they were quite glaring. That by itself would cast some doubt about the occurrence of the incident.

9. At this stage deserves to be noted one important feature from the evidence of the complainant's husband at Ex. 27 on the record of the case. He has stated that on 14th November 1990 his daughter informed him that her mother was subjected to rape by the person in whose employment the father was. The child was only four years old. It would be too much to expect from her who her father's employer was unless he was regularly visiting the house of the complainant. It is not the prosecution case that the appellant-accused used to visit the family quite frequently. In absence of familiarity with him, the prosecution has not explained how the child could give information to her father about commission of the offence by his employer at the relevant time. It may be mentioned at this stage that the child has not been examined as a witness at trial. Her police statement has also not been recorded.

10. That brings me to another important and significant feature appearing on the record of the case. The complainant's husband, at about 9.30 p.m. on 14th November 1990, informed the Police Control about his wife's attempt to commit suicide. As aforesaid, the Police Control transmitted that information to the Taluka Police Station at Rajkot. It was taken down in the concerned Register and the entry in that regard is at Ex. 35 on record. Thereupon prosecution witness No. 11 at Ex. 33 rushed to the spot. It is an admitted position that the information was regarding an attempt on the part of the complainant to commit suicide. It is again an admitted position on record that no offence against the complainant was recorded under sec.511 read with sec. 309 of the IPC in that regard. The panchnama of the scene of offence is stated to have been drawn and it is

at Ex. 25 on the record of the case. It is mentioned therein that her clothes found at that time smacked of kerosene smell. It is found recorded therein that those clothes were recovered. They have admittedly not been sent to any forensic science laboratory for their analysis and report. This omission on the part of the prosecution has not been explained in any manner at trial. The omission for not taking cognizance of the offence punishable under sec. 511 read with sec. 309 of the IPC against the complainant at the relevant time and omission of not sending her clothes to any forensic science laboratory for examination and report are vital omissions. In absence of any explanation from the prosecution agency in that regard, an adverse inference can be drawn to the effect that in either case the conclusion would have been otherwise. With respect, the learned trial Judge has not focussed his attention in a proper manner on this aspect of the case.

11. Looking at the above discrepancies and taking an overall view of the matter, I think there is no escape from the conclusion that the prosecution has not been able to bring the guilt home to the accused beyond any reasonable doubt. The prosecution version is not free from doubt. The benefit of doubt has to be given to the appellant-accused.

12. In view of my aforesaid discussion, I am of the opinion that the impugned judgment and order of conviction and sentence cannot be sustained in law. It has to be quashed and set aside. I am told that the appellant-accused is languishing in the Sabarmati Central Jail at Ahmedabad serving his sentence imposed by the learned trial Judge. He deserves to be released forthwith if no longer in any other case.

13. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge at Rajkot on 23rd March 1994 in Sessions Case No. 2 of 1992 is quashed and set aside. The appellant-accused is ordered to be released forthwith if no longer required in any other case. Direct service is permitted.